

Summary of Tribal Consultation with Fond du Lac regarding EPA review of U.S. Army Corps of Engineers Clean Water Act 404 Permit for U.S. Steel Minntac Mine Expansion

In its February 20, 2014 letter to Regional Administrator Susan Hedman, the Fond du Lac Band raised concerns regarding potential impacts to waters within its reservation from a proposed U.S. Army Corps of Engineers (Corps) Clean Water Act 404 permit for U.S. Steel's expansion of its Minntac mining operation. The tribe had expressed these concerns in comments on MPCA's proposed CWA Section 401 water quality certification for this permit. In response to the Band's concerns, EPA held a telephone consultation with Band representatives on April 10, 2014. The purpose of this call was for EPA to better understand the nature of the tribe's concerns, including the potential impacts to waters downstream of the permitted fill. Following the conference call, the Band sent additional information regarding its concerns.¹ EPA considered the Band's views and this document provides responses to concerns raised.

Participants in the April 10, 2014 Telephone Consultation:

Fond du Lac: Karen Diver, Chairwoman
Nancy Schuldt, Water Projects Coordinator
Wayne Dupuis, Environmental Program Manager
Reginald DeFoe, Resource Management Division Director

EPA: Tinka Hyde, Director Water Division
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Robie Anson, Water Quality Branch
Gary Prichard, Office of Regional Counsel
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Summary of Tribal Concerns and EPA Responses

The April 10, 2014 consultation call helped to clarify that the Band's concerns regarding impacts to water quality relate to wastewater discharges from the mine site, rather than the direct impacts of the fill that would be authorized by the 404 permit. These wastewater discharges are regulated under the National Pollutant Discharge Elimination System (NPDES) program administered by Minnesota Pollution Control Agency (MPCA). During the consultation call,

¹ September 2013 Tribal Cooperating Agencies Cumulative Effects Analysis for the NorthMet Mining Project and Land Exchange and the Draft Cumulative effects of mining on water quality in Ojibwe treaty-ceded territories and adjacent watersheds in Minnesota

EPA summarized the provisions in the CWA which specifically relate to the protection of downstream state or tribal water quality:

CWA Section 401: Pursuant to CWA Section 401(a)(1), States and authorized Tribes have broad discretion in exercising certification authority and EPA does not oversee State or Tribal 401 certifications. Pursuant to CWA Section 401(a)(2), when the Regional Administrator determines that a discharge proposed under a federal permit may affect the quality of a downstream state's waters, EPA will notify will notify the downstream state. The timeframe for such notification is within 30 days of receipt of the application and state 401 certification.

CWA Section 402: EPA oversees authorized state CWA 402 NPDES programs, including reviewing and potentially objecting to proposed NPDES permits, and has enforcement authority over NPDES permits. The CWA NPDES program has processes to help assure that the water quality standards of downstream states are protected, including the opportunity for a downstream state to comment on permit applications which may affect its waters (CWA § 402(b)(5)) and for EPA's authority to object (CWA § 402(d)).

CWA Section 404: Under EPA's Memorandum of Agreement with the Corps for implementation of the CWA 404 program, EPA's review of projects for which the Corps has issued public notice generally occurs within 30 days of issuance of a public notice. (In the case of Minntac, the reviewed period ended August 3, 2012.)

Concern: The tribe raised the concern that current wastewater discharges from the mine do not comply with Minnesota's water quality standards.

Response: EPA would like to clarify a distinction between permit compliance and compliance with water quality standards. As a general matter, discharges in compliance with the effluent limitations and other requirements of an NPDES permit are considered to be in compliance with the CWA. However if discharges do not comply with discharge limitations, or if the permit does not include appropriate limitations to protect water quality standards, then those discharges may cause or contribute to violations of water quality standards.

It is the responsibility of dischargers to comply with permit requirements and the responsibility of the regulatory agencies to take appropriate enforcement actions when they do not. It is also the permitting authority's responsibility, with EPA oversight, to issue permits with conditions sufficient to assure that water quality standards are properly implemented.

MPCA has issued NPDES permits that authorize discharges from Minntac's mine site and tailings basin. When these permits are reissued, MPCA, with oversight from EPA, will need to need to draft the permit such that the conditions imposed in the permit ensure compliance with applicable water quality requirements of all affected States to assure that discharges in compliance with the permit will not cause or contribute to violations of the state's WQS or those of Fond du Lac Band.

Concern: While water column concentrations of mercury are not a direct concern related to Minntac's discharge, the Band is concerned about long term and cumulative mercury bioaccumulation in fish due to mercury methylation and the influence of sulfate on methylation.

Response: EPA's consideration of the impacts of mine expansion associated with the 404 permit focused on the effects of additional fill associated with the mine pit expansion and the related effect on the mine site discharges to the St. Louis River system which are regulated by MPCA's NPDES program. EPA's understanding is that the expansion is expected to result in increased sulfate discharges to the St Louis River as a result of mining the expanded area of operations, however due to the complexity of the relationship between surface water sulfate concentrations and methyl-mercury production it is unclear what impact the increased discharge would have on mercury methylation in a high order river in the St Louis River. In the context of the NPDES permit reissuance, MPCA should consider the effects of the entire mine discharge (discharges related to the existing mine and those related to the expansion) when developing water quality-based effluent limits.

Concern: MPCA's 401 certification did not address water quality impacts of the mine activity which are resulting in exceedances of water quality standards and therefore the State should have denied 401 certification. The tribe clarified that its objection to the State's 401 certification applies to both the Rainey River and St. Louis River Watersheds.

Response: While EPA oversees MPCA's NPDES permit program, EPA has no formal role regarding the manner in which CWA 401 certifications are made by states and authorized tribes.

Concern: EPA has a responsibility to notify Fond du Lac pursuant to CWA Section 401(a)(2) regarding the State's CWA 401 certification of the Corps' proposed CWA 404 permit.

Response: EPA's initiation of the 401(a)(2) process is invoked where the Regional Administrator determines that discharges proposed under a federal permit "may affect" the quality of downstream waters. In this case, EPA did not make such a determination. Factors EPA considered included the timeframes under CWA 401(a)(2) which had lapsed, the nature of the fill activity authorized under the 404 permit which would be unlikely to have a direct effect on downstream water quality within the Fond du Lac Reservation, and the complexity of the relationship between surface water sulfate concentrations and methyl-mercury production particularly in a high order river such as the St. Louis River. The impact of wastewater discharges will be a matter for consideration under reissuance of the NPDES permit for the mining area.

Region 5 is in discussion with the U.S. Army Corps of Engineers, St. Paul District, to develop a protocol which allows the Corps and EPA to carry out notifications where appropriate and within the timeframes specified in the CWA and regulations for use in the future.

Follow up Actions:

1. EPA to convene a call with Fond du Lac, Grand Portage and MPCA (Call was held October 23, 2014.)
2. EPA to discuss with Corps a process for 401(a)(2) notification (Ongoing)
3. EPA and MPCA will engage in further discussions in the context of the NPDES permit as appropriate (Ongoing)